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# State v. Moemberg Appellant's Brief Dckt. 45250

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45250
Plaintiff-Respondent,	)	
	)	BANNOCK COUNTY NO. CR 2016-9836
v.	)	
	)	
DELIGHT MOEMBERG,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Delight Moemberg pleaded guilty to felony driving under the influence (DUI). The district court imposed a unified sentence of ten years, with five years fixed. On appeal, Ms. Moemberg asserts the district court abused its discretion when it imposed her sentence.

## Statement of the Facts & Course of Proceedings

Around midnight, dispatch broadcast an attempt to locate a red car that was reportedly unable to maintain its lane of travel, with a driver who was possibly driving under the influence. (*See* Presentence Report (*hereinafter*, PSI), p.4.)<sup>1</sup> Pocatello Police Department officers responded to the area and saw the red car swerving within its lane. (PSI, p.4; R., pp.12-19.) The car failed to stop at a stop sign, and officers conducted a traffic stop. (PSI, p.4.)

An officer contacted the driver of the car, identified as Ms. Moemberg. (PSI, p.4.) The officer observed Ms. Moemberg had red, bloodshot eyes, drooping eyelids, and slurred speech. (PSI, p.4.) Ms. Moemberg appeared to be falling asleep while talking to him, and could not maintain her balance when asked to get out of the car. (PSI, p.4.) She reported consuming about four malt beverages after leaving work that afternoon. (*See* PSI, p.4.) She stated she had consumed the last alcoholic beverage about twenty minutes before the traffic stop, was feeling the effects of the alcohol, and did not feel safe to be driving. (PSI, p.4.) Ms. Moemberg stated she had recently been battered and had been prescribed medication at the hospital, but had not taken her medication since the evening before. (*See* PSI, p.4.)

The officer attempted to administer standardized field sobriety tests, and Ms. Moemberg completed the horizontal gaze nystagmus test before refusing to complete any further tests. (PSI, p.4.) She stated she wanted to speak with her attorney, but was told she would not be able to speak with her attorney at that time. (PSI, p.4.) Ms. Moemberg again refused to complete any further tests, and officers then handcuffed and searched her. (PSI, p.5.) An officer transported her to the police department for evidentiary testing, where she refused to submit to a breath test until she spoke with an attorney. (PSI, p.5.) A standard records check showed she had multiple

DUI convictions, the most recent being a felony in 2008.<sup>2</sup> (PSI, p.5.) Officers then requested and received a warrant for a blood draw, and medical personnel drew Ms. Moemberg's blood. (See PSI, p.5.)

After the blood draw, Ms. Moemberg was taken to the Bannock County Jail and incarcerated for felony DUI. (PSI, p.5.) She was also incarcerated for child endangerment, because she had her three-month-old daughter in the car. (PSI, p.5.) Further, Ms. Moemberg and a passenger in the car, Lyle Plentywounds, were cited for violation of a no contact order barring contact between the two.<sup>3</sup> (See PSI, p.5.)

The State charged Ms. Moemberg by Prosecuting Attorney's Information with one count of driving under the influence of alcohol and/or drugs, a repeated offense, felony, I.C. §§ 18-8004 and 18-8005(9). (R., pp.81-84.) The State also charged her with a persistent violator sentencing enhancement under I.C. § 19-2514. (R., pp.85-86.) Ms. Moemberg entered a not guilty plea. (R., p.89.)

Pursuant to a plea agreement, Ms. Moemberg agreed to plead guilty to felony DUI. (See R., pp.109-15; Supp. Tr., p.1, Ls.9-15.)<sup>4</sup> The State agreed to dismiss the persistent violator sentencing enhancement, and the parties would be free to argue for any sentence. (See Supp.

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<sup>1</sup> All citations to the PSI refer to the 90-page PDF version of the Presentence Report and its attachments.

<sup>2</sup> At the time of the instant offense, Ms. Moemberg was on parole in Bannock County No. CR 2008-1406 (*hereinafter*, the 2008 case), a felony DUI case. (See PSI, pp.10, 12-13.) The underlying sentence in the 2008 case was a unified sentence of ten years, with five years fixed. (See PSI, p.10.) In the 2008 case, Ms. Moemberg's parole officer submitted a Report of Parole Violation, based on the circumstances of the instant offense. (See PSI, pp.12-13.)

<sup>3</sup> The presentence report indicates there was a no contact order in place, listing Ms. Moemberg as the protected person in a case against Mr. Plentywounds. (See PSI, p.12.)

<sup>4</sup> All citations to "Supp. Tr." refer to the Reporter's Supplemental Transcript on Appeal, which contains the transcript of Ms. Moemberg's change of plea hearing on April 3, 2017.

Tr., p.1, Ls.11-23.) The district court accepted Ms. Moemberg's guilty plea. (Supp. Tr., p.6, L.16 – p.7, L.3.)

At the sentencing hearing, Ms. Moemberg recommended the district court consider placing her on a retained jurisdiction program, or, alternatively, impose a unified sentence of no more than five years, with two years fixed, to be served concurrently with the sentence in the 2008 case. (*See* Tr., p.1, L.24 – p.3, L.1.) The State recommended the district court impose a unified sentence of ten years, with six years fixed. (Tr., p.4, Ls.10-16.) The district court imposed a unified sentence of ten years, with five years fixed, to be served concurrently with the sentence in the 2008 case. (*See* R., pp.122-25.)

Ms. Moemberg filed a Notice of Appeal timely from the district court's Minute Entry & Order – Judgment of Conviction.<sup>5</sup> (R., pp.127-30.)

### ISSUE

Did the district court abuse its discretion when it imposed a unified sentence of ten years, with five years fixed, upon Ms. Moemberg following her plea of guilty to felony driving under the influence?

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<sup>5</sup> Ms. Moemberg also filed a Motion Pursuant to Rule 35 ICR. (R., p.133.) The district court denied the Rule 35 motion. (R., pp.134-36.)

On appeal, Ms. Moemberg does not challenge the denial of her Rule 35 motion. The Idaho Supreme Court has held that “[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” *State v. Huffman*, 144 Idaho 201, 203 (2007). “An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information.” *Id.*

## ARGUMENT

### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Ten Years, With Five Years Fixed, Upon Ms. Moemberg Following Her Plea Of Guilty To Felony Driving Under The Influence

Ms. Moemberg asserts the district court abused its discretion when it imposed her unified sentence of ten years, with five years fixed, because her sentence is excessive considering any view of the facts. The district court should have followed Ms. Moemberg's recommendations by placing her on a retained jurisdiction program, or, alternatively, by imposing a unified sentence of no more than five years, with two years fixed, to be served concurrently with the sentence in the 2008 case.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Ms. Moemberg does not assert that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Ms. Moemberg must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* An appellate court, "[w]hen reviewing the length of a sentence . . . consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726

(2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Ms. Moemberg asserts her sentence is excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not adequately consider Ms. Moemberg’s desire to address her problems with substance abuse. The Idaho Supreme Court has recognized substance abuse as a mitigating factor in cases where it found a sentence to be excessive. *See, e.g., State v. Nice*, 103 Idaho 89, 91 (1982). Ms. Moemberg’s GAIN-I Recommendation and Referral Summary (G-RRS) contained a diagnosis of “Alcohol Use Disorder, Severe – In a Controlled Environment.” (PSI, p.33.) According to the presentence report, Ms. Moemberg reported she first drank alcohol at the age of twelve, and began drinking regularly when she was thirteen years old. (PSI, p.19.) She also reported marijuana was her drug of choice, although she only used it once since the age of seventeen. (*See* PSI, p.19.) Ms. Moemberg further stated she had used methamphetamine and inhalants. (PSI, p.19.) Ms. Moemberg stated all of her crimes revolved around the use of alcohol. (PSI, p.19.) Indeed, her criminal record includes a number of prior DUI convictions, including four previous convictions for felony DUI. (*See* PSI, pp.6-13; Tr., p.5, Ls.22-25.)

Ms. Moemberg now has the desire to address her problems with substance abuse. While Ms. Moemberg had completed several treatment programs in the past, during the presentence investigation she expressed she felt substance abuse treatment was necessary to get her life back. (*See* PSI, pp.12-13, 19.) At the sentencing hearing, Ms. Moemberg told the district court, “I know I’m an alcoholic and that does need tremendous treatment. And I believe that the new model in the rider program is – can address me and help me correct my wrongs.” (Tr., p.5, Ls.11-14.) The presentence investigator indicated Ms. Moemberg could get treatment while

incarcerated. (*See* PSI, p.24.) However, the G-RRS stated: “Based on ASAM criteria, self-report, and clinical observation Ms. Moemberg is recommended for Level 2.1 Intensive Outpatient Treatment.” (PSI, p.43.)

The district court also did not adequately consider Ms. Moemberg’s difficult childhood. She was adopted at birth by her great-aunt and the great-aunt’s husband. (PSI, p.14.) Ms. Moemberg felt her childhood was good, but sometimes bittersweet because she never got to be with her biological parents and her biological mother disowned her. (*See* PSI, p.14.) Her biological father died in a car accident. (PSI, p.14.) Ms. Moemberg stated she was molested by an uncle when she was six years old, and she never reported this abuse. (PSI, p.14.) She reported she left home at the age of fourteen, after becoming pregnant by an older male who was a friend of her brother. (PSI, p.14.) She also dropped out of school when she became pregnant. (PSI, p.17.)

Further, the district court did not give adequate consideration to Ms. Moemberg’s mental health issues. A district court must consider evidence of a defendant’s mental condition offered at the time of sentencing. *See* I.C. § 19-2523(1). Ms. Moemberg reported being diagnosed with anxiety first in 2008-2009, while she was participating in the Wood Court program. (PSI, p.18.) Her GRRS contained a diagnosis of “Unspecified Anxiety Disorder – Provisional.” (PSI, p.33.) The presentence investigator wrote, Ms. Moemberg “feels she is currently suffering from Post-Partum depression and believes she would benefit from mental health treatment at this time and that she ‘should of started asking for help after I quit breastfeeding last year.’” (PSI, p.19.)

Additionally, the district court did not adequately consider Ms. Moemberg’s wishes to take care of her family. Her infant daughter, at the time of the presentence report, was living with an aunt. (PSI, p.16.) In her written comments to the district court, Ms. Moemberg stated, “I



have a 12 month old Daughter who I love with all my heart and a 18 year old boy who has no direction. . . . I have 2 adult alcoholic/drug addict kids who are on the same path as me and [their] dad is on.” (PSI, p.21.) Ms. Moemberg wrote she needed to help her adult children get sober, and her mother was wheelchair-bound and going downhill as well. (PSI, p.21.) She stated, “I will do anything move any where to help myself, so I can be there for my baby Girl.” (PSI, p.21.)

Because the district court did not adequately consider the above mitigating factors, the sentence imposed by the district court is excessive considering any view of the facts. Thus, Ms. Moemberg asserts the district court abused its discretion when it imposed her sentence.

#### CONCLUSION

For the above reasons, Ms. Moemberg respectfully requests that this Court reduce her sentence as it deems appropriate.

DATED this 8<sup>th</sup> day of November, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8<sup>th</sup> day of November, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DELIGHT MOEMBERG  
INMATE #56647  
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DAVID C NYE  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

STEPHEN G LARSEN  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K JORGENSEN  
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CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas